No. 85-186

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Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

KENNETH A. HEROLD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Statement of the Case contained in the Petition for Writ of Certiorari filed by the petitioner, Burlington Northern Railroad Company (BN), is factually correct, but incomplete. BN was found liable to the respondent, Kenneth Herold, for negligence. Contrary to what BN's Petition for Writ of Certiorari would lead one to believe, the case was submitted to the jury on multiple theories of negligence, only one of which was the theory that BN was negligent in operating its lead locomotive while the amber rotating beacon was in a state of disrepair.

BN made a corporate decision to equip all of its new locomotives and retrofit all of its existing locomotives with

amber rotating warning beacons in 1970-71.[1] With the exception of 400 locomotives, BN's entire fleet of over 2500 locomotives was so equipped at the time of the subject accident. As was true with the vast majority of BN's locomotives, the locomotive which struck the vehicle operated by Kenneth Herold was ordered from the factory fully equipped with many parts and appurtenances, including an amber rotating beacon.[2] Just prior to the accident, BN had removed the flashing light portion of the rotating beacon from the locomotive for repairs. Notwithstanding the fact that the beacon was in disrepair, BN decided to operate this particular locomotive as the lead locomotive in the consist of seven for the trip from Mandan, North Dakota to Glendive, Montana.[3] It was on this trip that Kenneth Herold was injured.

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[1]Raymond W. Spannring, former chief mechanical officer for the Burlington Northern Railroad testified, in chambers, as follows:

Q. [BY MR. HOYT] In 1970 the Burlington Northern made the decision to put amber rotating beacons on all of its locomotives that were ordered thereafter and to retrofit those that were existing at that time; isn't that correct?

A. [MR. SPANNRING] It was either '70 or '71. I can't remember.

Q. About that time frame.

A. That's true.

Trial transcript ("Tr.") at 851-52.

[2]*Id.* at 847-54. The Burlington Northern claims man who investigated the accident, Michael J. Rockenback, testified that "from his information", the subject locomotive was equipped with an amber rotating beacon at the time of delivery by the manufacturer to the BN. *Id.* at 1100.

[3]BN's interrogatory answers revealed that all of the six trailing locomotives were equipped with amber beacons but that none of them were being operated at the time of the accident. See also testimony of Raymond Spannring, *id.* at 853. The District Court noted the ease with which BN could have placed one of the trailing locomotives in the lead position: "... because you have other engines [equipped with amber beacons] ... all you have to do in order to comply with the rule that you shall have the device on the engine operating properly is to pull your engine in until you can have it operating properly". *Id.* at 436.

The amber beacon is attached to the locomotive at the factory by way of a mounting bracket which is welded to the top of the locomotive in the same manner as the locomotive horn.[4] The beacon is then wired directly to the locomotive headlight and, in fact, operates off the same power source as the headlight. When the headlight is on, the amber rotating beacon is on. The amber beacon is a part of the entire locomotive and does not become operational until the locomotive itself is switched on.[5] Although the flashing light portion of the amber beacon had been removed for repairs at the time of the accident, the remainder of the amber beacon system including the mounting bracket and extensive electrical wiring remained on the locomotive.[6]

After hearing testimony in chambers from BN witnesses on the issue of whether or not the amber rotating beacon in question was a "part or appurtenance" under the Boiler Inspection Act, 45 U.S.C. §23, the District Court made the factual finding that the beacon was an appurtenance. The Court therefore instructed the jury that "it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless the appurtenances thereof are in proper condition and safe to operate in the service to which

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[4] *Id.* at 852. Interestingly, counsel for BN admitted in chambers that the locomotive horn (whistle) is an appurtenance because it is "an integral or essential part of a completed locomotive." *Id.* at 428.

[5] *Id.* at 853, 861-62.

[6] Plaintiff's Exhibit No. 77 was a photograph showing the mounting bracket for the amber beacon in addition to the wiring needed to connect it to the locomotive's electrical system. *Id.* at 1125-26. Subsequent to the accident, the subject locomotive was reequipped with a functioning amber beacon and to this day it continues to display an amber beacon both day and night while operating on BN's line between the Twin Cities and the Montana coal mines. *Id.* at 1107-08, 860-61.

the same are put ..."[7] This instruction was lifted from the language of 45 U.S.C. §23, as amended. Based upon the evidence presented and the instructions of the Court, the jury could have reasonably concluded that the lead locomotive was not "in proper condition and safe to operate" as required by the Boiler Inspection Act because its amber beacon was in disrepair.[8]

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE BOILER INSPECTION ACT WAS PROPERLY CONSTRUED BY THE DISTRICT COURT AND BY THE EIGHTH CIRCUIT COURT OF APPEALS

BN argues that the District Court and the Court of Appeals misconstrued the Boiler Inspection Act by concluding that the amber rotating beacon was a "part and appurtenance" under the Act and that it was not in proper working order at the time of the accident. BN maintains

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[7]Court's Jury Instruction No. 19, App. at 44a.

[8]The jury could have also reasonably concluded that the lack of an amber beacon on the lead locomotive contributed to the cause of the accident. According to the BN itself, the purpose of the amber beacon is to provide a visual warning to motorists at railroad crossings:

> Rotating amber beacons are considered effective warning devices in that amber beacons are visible from all directions. Burlington Northern is one of the few railroads which puts any kind of warning light on all of its locomotives. Amber beacons are installed on BN's locomotives as warning devices to help attract attention and warn of the presence of the locomotive.

Tr. at 1141-42. (Emphasis added). BN Regional Superintendent, John R. Reynolds, testified that: "The amber rotating beacon, I believe, is rapidly becoming the standard for all railroads. I can say that the top three railroads in crossing safety have all adopted the amber rotating beacon, and that's the Union Pacific, the Santa Fe and the Burlington". *Id.* at 1019-20. See also App. at 10a, n. 3.

that the amber beacon was not a part or appurtenance but instead a nonessential adjunct to the locomotive and that, therefore, liability may not be imposed as a result of its removal from the locomotive.

In support of its argument that the amber beacon was not a part or appurtenance, BN repeatedly quotes from the case of *Southern Railway v. Lunsford*, 297 U.S. 398 (1936). *Lunsford* concerned the question of whether or not a device called "Wright's Little Watchman", which was attached to the locomotive at the time of the accident, was an appurtenance within the meaning of the Boiler Inspection Act. This Court concluded that the device was only in the experimental stages and that without the device the locomotive could be employed in active service without increasing the peril to life or limb. The Court, however, cautioned:

> "Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute."

Id. at 402. The Supreme Court properly interpreted the Boiler Inspection Act in *Lunsford* by treating in the disjunctive those parts that are definitely prescribed by order of the Interstate Commerce Commission, and "integral or essential parts of a completed locomotive." *Id.* (Emphasis added). Thus a locomotive part need not be a required device in order for it to be an integral or essential appurtenance within the meaning of the Boiler Inspection Act.[9]

The decision in this case comports with the logic and law as set forth in the *Lunsford* case. It does not "turn ... *Lunsford* on its head", as BN maintains. The amber rotating beacon was an integral or essential part of the locomotive which struck Kenneth Herold and a jury could certainly conclude that the temporary absence of the

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[9]See, e.g., cases cited by the Eighth Circuit in its opinion below, App. at 9a-10a.

beacon from the lead locomotive could and did increase the peril to motorists at railroad crossings.

Another facet of petitioner's argument is that the railroad should not and cannot be held liable for removing a nonessential part of the locomotive for repairs. First, the premise itself is erroneous because the amber beacon was found to be an appurtenance under the Boiler Inspection Act, and not a nonessential part. Moreover, the fact that part of the beacon had been removed and was therefore not "in use" at the time of the accident does not exonerate BN. The implication is that BN could have only been found liable if the amber beacon was defective but left on the locomotive in an inoperable condition. This argument is ludicrous. Whether the defective beacon was taken off to be repaired or left on the locomotive in an inoperable condition does not change the essential fact that BN allowed its lead locomotive to be used when one of the locomotive's appurtenances was not in proper working condition. The mounting bracket and electrical wiring remained on the locomotive even though the flashing light portion had been removed. The contention that removal of the entire appurtenance should relieve BN of liability is thus without merit.

A case similar to *Herold* is *Green v. River Terminal Railway,* 585 F.Supp. 1019 (N.D. Ohio 1984). Although the railroad was relieved of liability in that case due to the lack of proximate cause, the Court did conclude that the railroad violated the Boiler Inspection Act because the locomotive radio receiver was missing at the time of the plaintiff's injuries. Although a radio was certainly not required by the Federal Railway Administration, the Court nonetheless found that since the railroad had used radios on its trains for a number of years, they could not be deemed "experimental" under the holding of *Lunsford, supra.* The fact that part of the radio was missing and the radio was thus rendered inoperable was precisely the basis for the Court's finding that the Boiler Inspection Act had been violated. The Court concluded that "once River Terminal made a conscious decision to put radios on its engines, it became obliged to see that they were maintained in proper condition." *Id.* at 1017-18.

The decision of the District Court and the logic of the Court of Appeals in this case cannot be faulted. Whether or not the amber rotating beacon was a part or appurtenance within the meaning of the Boiler Inspection Act was a question of fact properly placed before the trial judge for determination.[10] The District Court's finding that the beacon was an appurtenance is in no respect contrary to the Boiler Inspection Act and the many cases which have construed it.[11] The Petition for Writ of Certiorari should therefore be denied.

II. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND IS NOT CONTRARY TO OTHER EXISTING DECISIONS INTERPRETING THE BOILER INSPECTION ACT.

Certiorari should be summarily denied in this case because it does not present an important question of federal law. Nor does the decision of the Eighth Circuit Court of Appeals conflict with the decisions of other federal courts of appeal on the same matter.[12]

Since the Boiler Inspection Act was enacted into law over 70 years ago,[13] countless cases interpreting it have been heard and reviewed by courts all over the country.

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[10]The District Court struggled with the matter of whether this question of fact should be decided by the Court itself or by the jury. Tr. at 438. In the end, the Court properly decided that it should decide the facts in advance in chambers, before the evidence was submitted to the jury. *Id.* at 441-42.

[11]The Eighth Circuit cited at least 17 such cases, not one of which was accepted for review by this Court. See, App. at 9a-10a.

[12]S.Ct. Rule 17.

[13]The Boiler Inspection Act, as amended, was enacted February 17, 1911.

This case is simply another in a very long line of "appurtenance" cases. It certainly does not present an important question of federal law. Every day courts are asked to interpret and apply statutes and regulations within the context of specific factual situations. A logical construction was placed upon the Boiler Inspection Act by the Eighth Circuit Court of Appeals and a proper factual determination was made by the District Court. This Court should not disturb a lower court decision which is largely based on such a factual determination.[14]

The only possible remaining reason for this Court to grant review is that the Eighth Circuit Court of Appeals rendered a decision which conflicts with the decision of another federal court of appeals on the same matter. Contrary to BN's contention that a conflict between the circuits exists, there is total harmony between the decision of the Eighth Circuit and the decisions of other circuits.

BN cites the recent case of *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) in support of its argument that the circuits are in conflict. In *Marshall*, the locomotive involved in the accident was equipped with an amber rotating beacon which was on the locomotive and operating at the time of the accident. However, the locomotive was not and had never been equipped with strobe lights or oscillating lights. Plaintiff argued that in addition to the amber beacon, strobe lights or oscillating headlights should have been installed on the locomotive for the safety of motorists. The District Court agreed. However, in reversing the verdict, the Ninth Circuit Court of Appeals concluded that a jury could not mandate the addition of warning devices which were not required by the Boiler Inspection Act. Since the railroad was in compliance with the Boiler Inspection Act at the time of the accident, it could not be held responsible for failing to install additional warning devices.

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[14] *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972).

The *Marshall* court, however, did not foreclose a finding of liability predicated upon the failure of a railroad to actually maintain those lights which are, in fact, already a part of the locomotive. In distinguishing *Lunsford, supra*, the Ninth Circuit stated as follows:

> "[In *Lunsford*], the Court held that railroads have an ordinary duty of care to maintain properly all devices actually attached to a locomotive. This duty is in addition to the absolute liability established by the Boiler Inspection Act for failure to maintain "parts and appurtenances". There is no allegation here that strobe or oscillating lights were attached to the locomotive at the time of the accident, and that Burlington had negligently failed to maintain them. Rather, the allegation is that Burlington was liable for failure to attach strobe or oscillating lights. The ordinary duty of care described in *Lunsford* does not apply in these circumstances ..."

720 F.2d at 1152 (Emphasis added). It is obvious that, rather than conflicting with the *Marshall* decision, the Eighth Circuit's decision in *Herold* actually supports and complements it. A railroad may not be held liable for failure to append a nonrequired part, but once a part is appended and becomes an appurtenance, it must be maintained in proper condition. That is exactly the position of the Herolds in this case. There is no inconsistency between the decisions.

The Eighth Circuit's opinion in this case is also in accord with a Seventh Circuit decision rendered 64 years ago. In *Hines v. Smith*, 275 F. 766 (7th Cir. 1921), a railroad employee was struck and killed by a locomotive while working in the railroad yard at night. The automatic bellringer on the locomotive was not working at the time of the accident. The railroad therefore had its employees use a hand operated bell which was totally insufficient as a warning device. The Court ruled that even though the automatic bellringer was not definitely required by the Interstate

Commerce Commission, it was a "part and appurtenance" under the Boiler Inspection Act. Liability was therefore based solely on the failure of the railroad to equip its locomotive with a workable automatic bellringer on the night in question. The Court went on to conclude that the jury certainly could have found that the failure of the railroad to equip its locomotive with an operational bell was a proximate cause of the plaintiff's death.

BN finally urges this Court to grant certiorari because the decision in this case will supposedly plunge the railroad industry into confusion about the extent of its duty towards the motoring public. BN attempts to convince this Court that this case will dissuade railroads from experimenting with new safety equipment for fear that they will be held liable if the equipment is in disrepair. The decision in *Herold* is neither radical nor dramatic. It does nothing more than require a railroad to comply with the provisions of the Boiler Inspection Act, thereby increasing public safety.

The Boiler Inspection Act must be construed "in the light of its prime purpose, the protection of employees and others by requiring the use of safety equipment." *Lilly v. Grand Trunk Western Railroad,* 317 U.S. 481, 486 (1943). Despite the fact that the Federal Railway Administration decided not to require the installation of amber rotating beacons on all railroad locomotives, BN made a conscious decision to equip its own locomotives with such warning devices.[15] Having elected to do so and having elected to make amber rotating beacons standard safety equipment

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[15] The five year study conducted by the FRA did not conclude that alerting lights should never be used as part of the safety equipment on a locomotive. In fact, the FRA concluded its study by encouraging railroads to develop their own safety programs: "An individual railroad is in the best position to determine the optimum grade crossing program or programs for its particular situation." 48 Fed. Reg. 20257, 20258 (1983). BN determined in 1970 or 1971 that the amber rotating beacon was the optimum safety device for its particular situation.

on all of its locomotives, BN was required by the Boiler Inspection Act to keep this part and appurtenance "in proper condition and safe to operate in the service to which [it was] put."[16] Its failure to do so was properly considered by the Court as evidence of negligence submissible to the jury for its consideration. The decision of the Eighth Circuit Court of Appeals does not weaken or confuse the requirements of the Boiler Inspection Act. It merely reinforces those requirements and provides the nation's railroads with the incentive to operate safely.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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[16]Former FRA inspector Russell Dixon testified that if a railroad opts to put a device on its locomotives which is designed to provide protection to motorists at grade crossings, it should function properly, regardless of whether it is covered by a specific regulation or rule. Tr. at 1814, 1822.

DATED this 27th day of August, 1985.

Respectfully submitted,

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